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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 887

BOTANY WORSTED MILLS,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 888

BOTANY WORSTED MILLS,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FREDERIC R. SANBORN,
Of Counsel for Botany Worsted Mills.

THE COURT PRESS, N. Y. C.

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BOTANY WORSTED MILLS,

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NATIONAL LABOR RELATIONS BOARD,

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Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Botany Worsted Mills, petitioner herein (hereinafter referred to as "Botany") prays that writs of certiorari issue to review the order of the United States Circuit Court of Appeals for the Third Circuit, entered on February 1, 1943, and the decree, judgment or order of the said court denying the petition of Botany to set aside the order of

the National Labor Relations Board, the decision of the said court denying Botany's motion to adduce additional testimony and the decree granting the petition of the National Labor Relations Board to enforce its order within the limits of construction stated in the court's opinion, and as modified thereby.

Opinions Below.

The findings of fact, conclusions of law and order of the National Labor Relations Board (hereinafter referred to as "Board") are printed in the record. They are published in the official reports of the Board in 41 N. L. R. B. 218. The opinion of the United States Circuit Court of Appeals has not been officially reported, but is attached to the certified record.

Jurisdiction.

The judgment and order of the Circuit Court of Appeals was entered February 1, 1943. The jurisdiction of this Court is invoked under §240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. §347(a) and §10(e)) of the National Labor Relations Act (29 U. S. C. A. §160(e)), and under Rule 38 of this Court, §5.

Statute Involved.

The Statute involved is the National Labor Relations Act, which we shall here refer to as the "Wagner Act" or "The Act" (29 U. S. C. A. §151 *et seq.*). The pertinent provisions of the Act are: 29 U. S. C. A. §§151, 157, 158, 159 and 160.

Questions Presented.

1. Whether there is substantial evidence to sustain the Board's finding that trappers and sorters (32 out of 6500 employees) constitute a unit appropriate for collective bargaining.

2. Whether there is substantial evidence to sustain the finding that the union was, on December 13, 1940 and at all times thereafter, the exclusive representative of the employees in the unit for the purposes of collective bargaining.

3. Whether the Labor Board has accorded these employees their right freely to choose their collective bargaining agent.

4. Whether Botany was accorded fair hearings and due process of law in the proceedings before the Board.

5. Whether the Board's order should be enforced.

6. Whether the Act sets up a sufficiently ascertainable standard to determine the appropriate unit for collective bargaining.

Statement.

Botany is a New Jersey corporation having its principal office and place of business in Passaic, New Jersey. It operates a large woolen mill and employs approximately 6500 people. In its plant all the operations necessary to manufacture finished woolen and worsted fabrics are performed.

Upon the receipt of raw wool at the mill it must receive preliminary preparation for manufacturing processes. It is first necessary to separate the good from the bad.

The employees who perform this work are the subject of all the prior proceedings and of this appeal. They are called according to the type of work that they have done, sorters or trappers.

On or about March 8, 1940, Textile Workers Union of America, hereinafter referred to as the "Union", filed a representation petition with the National Labor Relations Board. Under the petition, the Union sought an election to determine whether or not it should be the agent for the purposes of collective bargaining, for the aforementioned sorters and trappers at Botany. A hearing was thereafter held, starting on or about August 9, 1940. Testimony was taken to determine whether the group set forth in the petition was an appropriate unit and whether or not an election should be held. The Board, however, refused to hear evidence of the desires of the employees involved concerning the appropriate collective bargaining unit: it refused to allow any cross examination of union officials concerning such desires, and refused Botany's request for subpoenas to the employees designed to elicit evidence of the unit desired by them.

The Board directed an election by its order of October 7, 1940 (Bd. A. 9-16). In its decision it selected as the appropriate unit the unit requested in the petition, to wit, sorters and trappers (Bd. A. 12, 13). The sorters and trappers composed a group of 32 to 42 employees out of 6500 (Bd. A. 13, 16, 17). An election was held on November 8, 1940, in which 32 employees voted. Eighteen employees voted in favor of the Union and 14 voted against the Union (Bd. A. 16, 17). The Union was thereafter certified on December 13, 1942 to be the collective bargaining agent for the aforesaid unit (Bd. A. 16, 17).

Between the date of the election, November 8, 1940, and the date of the certification by the Board, December 13, 1940, Botany received two letters signed by 20 of the

employees that voted in the election (Bd. A. 117, 118). These letters were written on or about November 15, 1940, and were received at a somewhat later date. In the letters, the employees signing them stated that "a goodly percentage of we wool sorters and trappers do not think being members of the C. I. O. will benefit us or our fellow workers and therefore do not wish to join that organization." At no time has any one charged, or even suggested, that these letters arose from any influence or act of Botany, or from any unfair labor practices, or indeed from anything other than the free will of the employees.

The result of these occurrences was to place Botany in an anomalous position. Under the Act, an employer is required to bargain with the freely chosen agent of its employees. As a result of the election and subsequent certification by the Board, the Union had been declared the agent. As a result of the action of the employees, the agency had been revoked. What was Botany to do?

The record shows that the Union in or about January, 1941, approached Botany for the purpose of bargaining (Bd. A. 40, 86-88). At this time Botany could not validly bargain with the Union, due to the revocation of the agency by the employees. The Union was so informed by a letter of March 21, 1941 (Bd. A. 48, 49). Moreover, the 20 employees signing the letters had attended a secret Union meeting at or shortly after November 15, 1940, and stated that they no longer wished to be represented by the Union. (Both the letters and the testimony were offered in evidence and refused (Bot. A. 72-a, 73-a) at the subsequent hearing.) The Union thereupon filed an unfair labor charge with the Board on or about January 14, 1941. A complaint was issued by the Board on or about June 2, 1941 and hearings held upon the charge in June of 1941.

Prior to any knowledge by Botany of the hearing, Botany attempted to reopen the whole proceeding, in order to call to the attention of the Board the fact that the employees had revoked any agency created, and to hold a new election (Bd. A. 110-118) to determine the wishes of the employees. Botany's attempt to reopen the case was denied by the Board (Bot. A. 7-a, 8-a).

Botany made further attempts to get the evidence of revocation before the Board. On June 11, 1941, Botany applied to the Regional Director of the Board for subpoenas to the 20 employees. The Regional Director denied the application without prejudice to Botany's right to renew the application before the trial examiner. The application was renewed before the trial examiner on June 16, 1941 (Bot. A. 45-a, 46-a). The trial examiner reserved decision and later denied the application (Bot. A. 55-a, 56-a).

At the hearing and in its answer, Botany took the unqualified position that it was not guilty of an unfair labor practice in refusing to bargain with the Union. In its answer it pleaded the following five affirmative defenses: (1) that the employees had revoked the authority of the Union to act for them as their collective bargaining agent; (2) that Botany had requested a reopening of the case to take the testimony of the employees, which request had been denied; (3) that the unit of sorters and trappers was not an appropriate unit; (4) that the Board had acted arbitrarily and unreasonably in making its determination of the unit by its decision of October 7, 1940; (5) that Section 9, subdivision (b) of the National Labor Relations Act was unconstitutional in that it did not set up an ascertainable standard by which an appropriate unit could be determined (Bd. A. 96-101).

In addition to refusing the issuance of the 20 subpoenas, the trial examiner struck out the five affirmative defenses (59a-64a).

The Board thereafter determined that Botany was guilty of an unfair labor practice in refusing to bargain with the Union and on May 25, 1942, issued its order requiring Botany to bargain with the Union (Bd. A. 18-35).

Thereafter, Botany petitioned the Circuit Court of Appeals, Third Circuit, to review and set aside the order of May 25, 1942. Botany also moved for leave to adduce additional testimony specifically referring to the testimony of the 20 employees. At the same time, the Board petitioned for enforcement of the order. All of these proceedings appear in the certified record.

On February 1, 1943, the decisions of the Circuit Court of Appeals were entered as an order and decree, respectively. The court by its order denied Botany's petition to set aside the order of May 25, 1942. The court has made no order specifically denying Botany's motion to adduce additional testimony although in its decision filed January 18, 1943, the motion was denied. By decree, the court ordered Botany to cease and desist from refusing to bargain with the Union. The decree substantially affirmed the decision and order of the Board. A modification of the Board's order was made, in that the court determined that there was absolutely no coercion on the part of Botany in connection with its employees. (The Board had made no such allegations in its complaint.)

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that a unit of 32 trappers out of 6500 employees constitutes a unit appropriate for collective bargaining.

2. In holding that there was substantial evidence that the Union was the exclusive representative of all em-

ployees in the bargaining unit selected at the time when a refusal to bargain collectively was charged.

3. In holding that Botany received a fair hearing and that due process of law was observed.

4. In failing to set aside the order of the Board upon the ground that by appointing as trial examiner the attorney who had conducted the preliminary investigation and preparation for the hearing, Botany was denied a fair and impartial hearing.

5. In failing to set aside the order of the Board for the reason that the trial examiner and the Board admitted into evidence over the objection of Botany a document that the trial examiner had not read.

6. In failing to set aside the order of the Board for the Board's refusal to permit inquiry into the desires of the employees themselves concerning the appropriate unit for collective bargaining purposes.

7. In failing to set aside the order of the Board for denying Botany the right to examine a witness and learn the names of certain other witnesses who could have given relevant testimony.

8. In refusing to hold that the entire record of the *Arlington Mills* case, 31 N. L. R. B. 21, should have been admitted into evidence.

9. In failing to set aside the order of the Board for refusal to issue subpoenas to secure the evidence of the employees themselves concerning the appropriateness of the unit and their desire to be represented by the Union.

10. In denying the motion of Botany to adduce additional testimony.

11. In failing to hold that the Act is unconstitutional in that it does not set up an ascertainable standard by which the appropriate unit for collective bargaining can be determined.

The Reason for Granting the Writs.

a. The decision below in upholding the order of the Board that 32 trappers constitute a unit appropriate for collective bargaining is in conflict with the simultaneous holding of the Board in *Arlington Mills*, 31 N. L. R. B. 21.

b. The decision below gives sanction to the selection of a unit which has never before been held appropriate.

c. The decision below gives sanction to the unfair act of the Board in appointing as trial examiner an attorney who had made the preliminary investigation in the proceeding and who could not act impartially.

d. The decision below encourages the organization of employees into small groups with a resulting serious handicap to employers in the efficient operation of their business.

e. The decision below sanctions the actions of the Board in refusing to allow the introduction of material and relevant evidence and in cutting off the right of Botany to cross-examine.

f. The decision below denies to the employees the full freedom of choice of their bargaining agent granted to them by the National Labor Relations Act.

g. The decision below in enforcing the order of the Board has in effect allowed the Board to deprive Botany of its rights without due process of law.

h. The questions presented are of great public importance.

WHEREFORE, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue writs of certiorari, directing the United States Circuit Court of Appeals for the Third Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the judgment and order of the Circuit Court of Appeals may be reversed and that your petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated, April 2nd, 1943.

BOTANY WORSTED MILLS,
Petitioner.

By FREDERIC R. SANBORN,
Counsel for Petitioner.